In the Supreme Court of the United States

OCTOBER TERM, 1947.

No. 159.

THE WHEELING & LAKE ERIE RAILWAY COMPANY
and
THE PENNSYLVANIA RAILROAD COMPANY,
Petitioners,

vs.

WILLIAM KEITH,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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COUNTER STATEMENT OF QUESTION PRESENTED.

We submit that the basic question presented by this case is whether the so-called "primary duty rule" has been abolished. To state the question another way—under the Federal Employers' Liability Act, does contributory negligence consisting of the violation of written orders stand on a uniquely different basis from other types of contributory negligence?

COUNTER STATEMENT OF FACTS.

This is a case where at least six employees on a train saw and read or had read to them, a written train order directing the train to take a siding and wait until two oncoming trains should have passed in the opposite direction. The train took the siding and waited until one of the oncoming trains had passed. By unaccountable coincidence, every man on the waiting train forgot about the second train, with the possible exception of the conductor,

and the waiting train then pulled out from the siding and proceeded up the main line about three miles, into a head-on collision with the second oncoming train. The engineer who was injured brought action.

We are here concerned with the question whether his forgetfulness was as a matter of law the sole proximate cause of his injuries—or whether the contributing negligence of the other employees on the train was in some part responsible.

We believe that the Statement of Facts as presented by the Petitioners does not sufficiently point up the contributing negligence of the conductor.

The Circuit Court of Appeals, in its Opinion, reported at 160 Fed. (2d) 654, made a reasonable and well considered resume of the evidence which we prefer to adopt as a Counter Statement of Facts on behalf of the Respondent. For the convenience of the Court the Circuit Court of Appeals' resume is quoted below:

> "William Keith, a railroad engineer, brought this action, based upon the Federal Employers' Liability Act, against The Wheeling & Lake Erie Railway Company (herein called Wheeling) and The Pennsylvania Railroad Company (herein called Pennsylvania) for damages for injuries sustained by him in a collision, resulting from alleged negligence of both defendants. The defendants answered separately denying negligence. At the conclusion of the evidence, the District Court directed a verdict for each defendant, on the ground that the engineer's conduct was the sole proximate cause of the accident.
>
> Wheeling, as a part of its railroad system, had tracks between Bridgeville, Pennsylvania, and Brewster, Ohio. By agreement between Wheeling and Pennsylvania, either company might 'by reason of unforeseen circumstances' detour its trains over the tracks of the other, the 'Foreign Company' to use its own engines, engine crews and train crews, but always with a pilot to be furnished by the 'Home Company' and subject to all the rules and regulations of

the Home Company and the orders of its train dispatcher. The Foreign Company agreed also to hold the Home Company harmless for all loss and damages sustained by reason of such trains being detoured.

On the night of the accident, which occurred about 4:35 A. M., on January 1, 1943, Keith, a Wheeling engineer, and Bush, a Wheeling conductor, were notified to go to Bridgeville and pilot a Pennsylvania train west over the Wheeling tracks to Brewster, Ohio. The engine was No. 7088 and the Pennsylvania crew, including its engineer, fireman, conductor and flagman, remained with the train. On this run, the pilot crew of the westbound No. 7088 received orders at several points including Sherrodsville, Ohio, where Train Order No. 16 was received, directing that No. 7088 take the west siding at New Cumberland and there meet two eastbound trains. The order was written on a form which had printed at the bottom 'Conductor and engineer must each have a copy of this order.'

Bush testified that he got a copy of the order, read it, showed it to his flagman, a Pennsylvania employee, and laid it on the desk of the caboose. He did not recall whether the Pennsylvania conductor, who was in the cupola, read it. He further testified that when they went into the siding at New Cumberland, the flagman opened the door of the caboose to throw the switch, and the wind 'blew the orders out on the floor of the caboose'; that after the collision they were found back of the stove.

Keith testified that he received a longhand carbon copy of train order No. 16 at Sherrodsville, that he understood what the order meant, namely, that he was to meet two trains at New Cumberland. He testified that he read the order and passed it to the Pennsylvania fireman and then to the Pennsylvania engineer; that he himself repeated the orders to the fireman, as required by the rules, and that after they were handed back to him, he put them in his pocket.

Keith also testified that while No. 7088 was on the siding he helped the fireman take down coal because the latter 'was played out'; that in the twenty or twenty-five minutes the train was on the siding, he

did not leave the train except probably to oil the engine. One eastbound train passed while No. 7088 was still on the siding. The accident occurred when Keith, admittedly forgetting the order and thinking the track was clear, pulled out of the siding and proceeded west about three miles, where No. 7088 collided head-on with the second eastbound train on a curve, somewhat east of the Valley Junction crossing. The injuries for which he sues were sustained in this collision.

In his opening statement counsel for Keith admitted that Keith was negligent in pulling out of the siding contrary to the orders. However, he based his claim for recovery upon the negligence (1) of Bush, the conductor; (2) of the engineer of the train with which he collided; and (3) of Wheeling in failing to provide block signals.

We now examine the record further to determine whether there was evidence tending to show that conductor Bush was negligent.

The record contained the following matter bearing upon the negligence of Bush: Rule 105 of Wheeling stated, 'Both conductors and enginemen are responsible for the safety of their trains and, under conditions not provided for by the rules, must take every precaution for their protection.' Rule 106 is, 'In all cases of doubt or uncertainty the safe course must be taken and no risks run.' Rule 247 provided in part, 'The general direction and government of a train from the time of receiving its passengers or freight until it has arrived at destination, is vested in the conductor. He is responsible for its safe and proper movement. * * * In all places and under all circumstances the safety of the train is of first importance, and nothing must be left undone which will secure the same.'

There was evidence tending to show that Bush not only lost the order calling for the meeting of two trains at New Cumberland but that during the stay of twenty or twenty-five minutes on the New Cumberland siding, he did not find them, although they were probably on the floor of the caboose the whole time; that he was at least jointly responsible for the train

if not in command of it; that he told the Pennsylvania flagman that he did not like pulling out of the siding since he thought two trains were to be met there; that he could himself have stopped the train by applying the air brakes; that having lost his own copy of the order, he could have checked his recollection of the contents of the order with the engineer, in a matter of minutes. He did not do so; but in fact sanctioned the mistaken operation after the train pulled out of the siding. He testified: 'We threw the switch and gave him' (the engineer, Keith) 'the proceed signal or high ball.'

There was evidence tending to show that Keith pulled out of the siding slowly, that after his train was on the main line he proceeded slowly until some member of the crew set the switch for the main line and until he saw the high ball signal, and that he then went ahead. There was evidence that both Bush and the Pennsylvania flagman with him in the caboose could and did see the headlight of what proved to be the oncoming eastbound train, and that Bush could at that time have stopped the train, but did nothing about it.

A resume of the evidence clearly indicates that it was sufficient, if submitted to the jury, to sustain a finding of negligence on the part of Bush."

ARGUMENT.

The Federal Employers' Liability Act provides, in applicable part, as follows:

> "Every common carrier by railroad while engaging in commerce * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury * * * resulting * * * in part from the negligence of any of the * * * employees of such carrier." (Title 45, U. S. C. A., Section 51.)

Few statutes contain clearer language. Under the express terms of this Act if one employee is 95% responsible for his own injury and another employee is only 5% responsible for the same injury, then the injured employee would have a cause of action against the carrier and could recover for the 5% of his suffering and disability.

Under the Act, contributory negligence as a complete defense has been abolished. The Act provides, in applicable part:

> "In all actions hereafter brought against any such common carrier by railroad * * * the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee * * *." (Title 45, U. S. C. A., Section 53.)

This section would seem to reinforce the clear meaning of Section 51, Title 45. The plain intent and purpose of the statute is to provide that where a railroad employee suffers injury which is due in part to the negligence of another employee, he may recover for that proportional part of his injuries.

Petitioners in this case are not relying and can not rely upon the language of the Federal Employers' Liability Act. They rely rather upon the fact that the Supreme Court of the United States once re-wrote the Act by judi-

cial interpretation in a series of cases which are cited in part by Petitioners.

The first case of the series was *Davis v. Kennedy,* 266 U. S. 147, 69 L. Ed. 212. In *Davis v. Kennedy* an action was brought for the death of an engineer who had instructions never to pass a certain siding unless he was sure that the track ahead was clear of another train which had the right of way. The engineer negligently ran his train out on the main track beyond the meeting point, and was killed in the resulting head-on collision. The engineer's administratrix recovered a judgment which was affirmed by the Supreme Court of Tennessee on the theory that other members of the crew as well as the engineer were bound to look out for the approaching train, and that their negligence contributed to cause the engineer's death.

The Opinion makes it clear that the conductor of the train was probably not guilty of negligence inasmuch as the conductor had told the engineer that the train was crowded and had asked the engineer to keep a lookout for the approaching train which had the right of way. The engineer agreed to do so, but despite this timely warning ran beyond the meeting point and the collision occurred.

The Supreme Court reversed the judgment for the plaintiff in a brief Opinion, the pertinent part of which we quote in full:

> "It was the personal duty of the engineer positively to ascertain whether the other train had passed. *His duty was primary* as he had physical control of No. 4, and was managing its course. It seems to us a perversion of the statute to allow his representative to recover for an injury directly due to his failure to act as required on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more." (Emphasis added.)

We wish to call the Court's particular attention to the phrase "*his duty was primary.*" So far as we can ascertain, this was the beginning of the "primary duty" rule.

The second case in the series is *Unadilla Valley R. Co. v. Caldine*, 278 U. S. 139, 73 L. Ed. 224. This was a case where both the conductor and the engineer of a train had printed orders to the effect that their train was to take a siding in the Bridgewater Yards in order to allow another train to pass. When the train reached the siding on the day of the accident the conductor, Caldine, directed his train to go on. The engineer ran the train out on the main track beyond the passing point, and a head-on collision resulted wherein both the engineer and the conductor were killed.

The conductor's administratrix recovered judgment in the state Court, which was brought through the state Appellate Courts to the United States Supreme Court for review. Apparently the theory of plaintiff's action was that the engineer's conduct in physically starting the train, and the failure of the station agent to pass on to the conductor a warning he had received from the engineer of the approaching train to the effect that that train was on its way and would pass at Bridgewater—was negligence which contributed to the collision. The Supreme Court reversed the judgment of the Trial Court and denied to the conductor any right of recovery, using the following language in the Opinion:

> "It seems to us that Caldine, or one who stands in his shoes, is not entitled as against the railroad company that employed him, to say that the collision was due to anyone but himself. *He was in command.* He expected to be obeyed, and he was obeyed as mechanically as if his pulling the bell had itself started the train. In our opinion he can not be heard to say that his subordinate ought not to have done what he ordered. He can not hold the company liable for a disaster that followed disobedience of a rule intended to prevent it, when the disobedience was brought about and intended to be brought about by his own acts. See *Davis v. Kennedy*, 266 U. S. 147, 69 L. Ed. 212, 45 Sup. Ct. Rep. 33." (Emphasis added.)

The Supreme Court, by these two cases, committed itself to a logical impossibility. In *Davis v. Kennedy* it held that the engineer had the "primary duty" to obey the passing order and that he could not recover if he failed to perform this duty. In *Unadilla Valley R. Co. v. Caldine* the Supreme Court held that the conductor of the train was in command, and where he passed on the order to proceed and was obeyed, the resulting collision was due wholly and solely to the conductor's negligence. These two cases were the source and fountainhead of a rule that came to be known familiarly as the "primary duty" rule, and they were followed in several Court of Appeals cases.

The problem again came before the Supreme Court in *Southern Ry. Co. v. Youngblood,* 286 U. S. 313, 76 L. Ed. 1124; and *Southern Ry. Co. v. Dantzler,* 286 U. S. 318, 76 L. Ed. 1127.

In these companion cases the facts were that both the conductor and engineer of the train had received written orders to take a siding so that an approaching train might pass. The train did not hold to the siding, but instead continued up the main line where a head-on collision resulted, killing both the conductor and engineer. Copies of the written orders were found on their bodies.

Although the Opinions do not make this too clear, it appears that the conductor wilfully disobeyed the orders in the belief that they had time to reach a siding two miles farther on, and the engineer forgot the orders. It also appeared that the conductor and engineer were supposed to receive a second copy of their orders at a second telegraph point, after the original orders had been received. The second telegraph operator, who was supposed to give them the reminder order, misinterpreted his instructions and failed to deliver them.

Both the engineer's and the conductor's estates recovered in wrongful death actions on the theory that the negligence of the second telegraph operator contributed to the collision. The Supreme Court wrote a full Opinion

in the *Youngblood* case, which involved the conductor, of which the meat is this:

> "The case comes to this: that respondent's intestate had clear and definite orders, which if obeyed, would have avoided the accident and the disobedience whereof was the sole efficient cause of his death. *As said in Unadilla Valley R. Co. v. Caldine,* 278 U. S. 139, 142, 73 L. Ed. 224, 232, 49 S. Ct. 91: 'A failure to stop a man from doing what he knows that he ought not to do, hardly can be called a cause of his act. *Caldine had a plain duty and he knew it.* The message would only have given him another motive for obeying the rule that he was bound to obey'." (Emphasis added.)

In short, in the conductor's case the Supreme Court held that his violation of his plain duty was the sole cause of the collision and his death, relying upon and reaffirming *Unadilla Valley R. Co. v. Caldine, supra.*

On the same day the same Court passed upon the engineer's case. *Southern Ry. Co. v. Dantzler,* 286 U. S. 318, 76 L. Ed. 1127. In a two paragraph Opinion the Court reversed judgment for the engineer's estate, saying that the facts were the same as in the preceding case, and concluded:

> "For the reasons given in the Opinion in No. 788 (Case No. 788, *Southern Ry. Co. v. Youngblood*) the judgment must be reversed and the cause remanded for further proceedings not inconsistent with this Opinion. It is so ordered."

At first blush this would seem to mean that since the conductor's disobedience of his "primary duty" was the sole efficient cause of the collision, then the engineer could not recover, which is absurd. Actually the Court was relying in the engineer's case on the doctrine in *Unadilla Valley R. Co. v. Caldine, supra* and *Davis v. Kennedy, supra,* to the effect that where the engineer has a plain duty to obey orders, his failure to obey them is the sole cause of the accident; and where the conductor likewise has the same

or a higher duty to obey the orders, his failure to obey them is likewise the sole cause of the collision. This, in turn, would mean that so far as the Supreme Court was concerned, one collision could have two entirely separate and independent, but nevertheless sole and single causes.

On the same day the Supreme Court decided a third case, which is relied upon by petitioners in their brief—*St. Louis Southwestern Ry. Co. v. Simpson*, 286 U. S. 346, 76 L. Ed. 1152. In this case an engineer had received orders to wait at a siding until an approaching train had passed and cleared the main track. The conductor had written copies of the same order. The engineer, instead of waiting at the siding, moved out onto the main track. The brakeman in the caboose remembered the order and called out to the conductor to apply the air brakes, and one of the brakemen offered to apply the brakes himself. The conductor forbade this and instructed the men to bring him the written orders so that he might read them again. While the orders were in his hand and he was checking on them, the collision occurred. The engineer was killed in the collision and a wrongful death action was brought by his administratrix on the theory that the conductor had the last clear chance to avoid the accident.

Justice Cardozo wrote the Opinion for the Court and held that the doctrine of last clear chance did not apply. The Court did not take the unsound position that the conductor was not negligent. On the contrary, the conductor's negligence was freely recognized. For example, the Opinion says in part:

> "There is an absence of the essential factors that wake into life the doctrine of the last clear chance. In the first place, the conductor did not know any more than Simpson (the engineer) did that an order had been violated. * * * *Negligent he may have been,* but not recklessly indifferent to a duty to counteract a peril perceived and understood. * * * In the second

> place, the negligence of the engineer and the *negligence of the conductor* were substantially concurrent. * * * The *negligence of the conductor* in failing to give warning was not separated by any considerable interval from the consequences to be averted * * *. The several acts of negligence were too closely welded together in time as well as in quality to be viewed as independent." (Emphasis added.)

It seems clear that in this portion of its Opinion the Supreme Court recognizes that the engineer was negligent; that the conductor was negligent; and that the conductor had a duty equivalent to or paramount of the duty of the engineer to keep the train on the siding until the passing train should clear the track.

It would seem equally clear that the negligence of both the engineer and the conductor caused the collision, with the result that the plain language of the Federal Employers' Liability Act would justify a partial recovery for the engineer for the partial contributing negligence of the conductor. On this point, however, the Court reverted back to the "primary duty" rule of *Davis v. Kennedy* and *Unadilla Valley R. Co. v. Caldine.* The Opinion states at 286 U. S. 350:

> "The facts so summarized are insufficient to relieve the engineer from the sole responsibility for the casualty that resulted in his death. What was said by this Court in *Davis v. Kennedy,* 266 U. S. 147, 69 L. Ed. 212, 45 S. Ct. 33, might have been written of this case. 'It was the personal duty of the engineer positively to ascertain whether the other train had passed. *His duty was primary* as he had physical control of No. 4 and was managing its course. It seems to us a perversion of the statute to allow his representative to recover for an injury directly due to his failure to act as required on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more.' See also *Unadilla Valley R. Co. v. Caldine,* 278 U. S. 139, 73 L. Ed. 224, 49 S. Ct. 91." (Emphasis added.)

We repeat again: The Court held that the engineer was negligent; the conductor was negligent; the negligence of both continued to the moment of impact; the acts of negligence "so closely welded together in time as well as in quality" produced the collision; but nevertheless the engineer was solely responsible for the collision when the engineer's case was being tried. It is equally true that if the conductor's case had been on trial, his negligence would likewise have been the sole cause of the collision because under the *Davis v. Kennedy* and *Unadilla Valley R. Co. v. Caldine* cases both the engineer and the conductor have the primary duty to control the train, and both are solely responsible for a collision such as that involved in this case.

We observe again, however, that this absurd doctrine was not based and could not be based upon the language of the Federal Employers' Liability Act. It was based rather upon a judicial interlineation of new principles into the Act.

The Supreme Court has already reversed itself on this proposition and restored to the Act its original meaning.

In the case of *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610, the Supreme Court, in the majority Opinion, specifically states that the doctrine of *Unadilla Valley R. Co. v. Caldine* and *Davis v. Kennedy* has been "swept into discard."

In 1939 Congress amended the Federal Employers' Liability Act to abolish the defense of assumption of risk. At first blush it would seem that assumption of risk had nothing whatever to do with the doctrine of "primary duty" and its subordinate myth of "sole efficient cause" which had been announced in the earlier cases already discussed. In the *Tiller* case, however, the Supreme Court said that those invented doctrines were simply assumption of risk doctrines parading under false names. Note well the language of the majority Opinion at 318 U. S. 63, 87 L. Ed. 615:

"Aside from the difficulty of distinguishing between contributory negligence and assumption of risk, many other problems arose. One of these was the application of the 'primary duty rule' in which contributory negligence through violation of a company rule became assumption of risk. *Unadilla Valley R. Co. v. Caldine,* 278 U. S. 139, 73 L. Ed. 224, 49 S. Ct. 91; *Davis v. Kennedy,* 266 U. S. 147, 69 L. Ed. 212, 45 S. Ct. 33. Other complications arose from the introduction of 'promise to repair,' 'simple tool' and 'peremptory order' concepts into the assumption doctrine."

We freely admit that in the *Unadilla Valley R. Co.* and *Davis* cases the Supreme Court nowhere used the magic words "assumption of risk. On the contrary, the Supreme Court merely said that where a man violates his "primary duty" to obey a company rule, then he can not recover. But the important fact is that on February 1, 1943 the Supreme Court itself held that the "primary duty" doctrine was in fact (though not in name) an assumption of risk doctrine; and held further that the "primary duty" doctrine was abolished, obliterated and swept into discard by the 1939 amendment to the Federal Employers' Liability Act which went into effect years after the decisions in the cases relied upon by the petitioners, namely, *Southern Ry. Co. v. Youngblood, Southern Ry. Co. v. Dantzler* and *St. Louis Southwestern Ry. Co. v. Simpson, supra.*

The Court's Opinion in the *Tiller* case recognizes that all that was involved in the *Unadilla* case and *Davis v. Kennedy* case was contributory negligence. The Court specifically states in speaking of the "primary duty rule" that:

"*Contributory negligence through violation of a company rule became assumption of risk. Unadilla Valley R. Co. v. Caldine,* 278 U. S. 139, 73 L. Ed. 224, 49 S. Ct. 91; *Davis v. Kennedy,* 266 U. S. 147, 69 L. Ed. 212, 45 S. Ct. 33." (318 U. S. at 63.)

Proceeding further and referring specifically to the *Unadilla* and *Davis* cases, the Court says:

> "It was this maze of law which Congress swept into discard with the adoption of the 1939 amendment to the Employers' Liability Act, releasing the employee from the burden of assumption of risk *by whatever name it was called.*" 318 U. S. at 64 (Emphasis added.)

As the result of the decision in the *Tiller* case, the Federal Employers' Liability Act once more is to be interpreted to mean exactly what it says; and if the negligence of one employee contributes in part to a collision in which another negligent employee is injured, then both employees have a right to partial recovery. If this doctrine is shocking and is a "perversion of the statute," as Justice Holmes once named it, the remedy still lies with Congress to change the law and to change the effect of the *Tiller* case.

We are left with a situation very much like that in *St. Louis Southwestern Ry. Co. v. Simpson,* 286 U. S. 346, wherein the Court specifically held that the conductor was negligent and that his negligence contributed to the collision, but denied recovery to the engineer wholly upon the basis of the now abolished doctrine in *Davis v. Kennedy.*

The factual situation, to review it briefly, is this: Both the conductor and the engineer of a train had written orders to take a siding and allow two other trains to pass on the main track. Both men had read the orders and understood them. The engineer had put his orders away in his pocket and the conductor had let his orders blow away from the desk and fall behind the stove, so he says. The flagman had likewise seen a copy of the orders. After one of the approaching trains had passed on the main track the engineer began to pull out. The conductor had his flagman give the engineer a highball or a proceed signal. Thereafter the flagman reminded the conductor of the other train

by pointing out its headlight. Under the company rules the direction and government of the train was vested in the conductor. He was responsible for its safe and proper movement. The conductor had the means at hand to stop the train and could have done so at any time as easily as the engineer.

Two men—Keith and Bush—were responsible for the movement of the train in accordance with the rules. These two men each had received and read a copy of the written orders directing them to take a siding to let an approaching train pass. These two men each forgot the order. The one man, Bush, through his flagman, gave to the engineer a highball or proceed signal, and thus both directed and approved the movement of the train out onto the main track.

The engineer handled the throttle and handled the physical movement of the train out onto the main track, pursuant to the clearance and approval given to him by the conductor. Each had the physical means and each had the authority to stop the train at any time while it was proceeding toward the collision. The one man, Bush, was reminded of the order through seeing the headlight of the approaching train, but apparently the reminder was not effective and did not recall to his mind the specific terms of the order. Likewise, the engineer, Keith, was not reminded of the order until a collision was inevitable.

Under this set of facts we submit that it would be a perversion of the Federal Employers' Liability Act, as it is now written, to hold by some wordy subterfuge that a jury could not find both men were negligent and that the negligence of both had a causal connection with the collision.

In its decision the Circuit Court of Appeals did not hold that the negligence of the conductor, Bush, was a proximate cause of Keith's injury, as Petitioners' brief would lead one to believe. It held, rather, that the evidence was such that a jury, under appropriate instruc-

tions, might find that Keith's negligence was the sole proximate cause of his injury—but that a jury could also find under the evidence that the negligence of Bush contributed in part to cause Keith's injury. If the jury found that the negligence of Bush contributed to the injury, then the damages would be proportioned accordingly.

We submit that the position taken by the Circuit Court of Appeals was sound; that it correctly interpreted the pronouncement of the Supreme Court in the case of *Tiller v. Atlantic Coast Line Ry. Co.*, 318 U. S. 54; and that it correctly interpreted the meaning of Section 1 of the Federal Employers' Liability Act (Title 45 U. S. C. A., Section 51).

CONCLUSION.

We submit that there is no error in the decision of the Circuit Court of Appeals and that the Petition for a Writ of Certiorari should accordingly be denied.

Respectfully submitted,

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